Jan 10 2000

(6)

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

No. 99-5153

In the Supreme Court of the United States

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Ex Post Facto Clause precluded the district court, upon revoking petitioner's supervised release, from ordering petitioner, under 18 U.S.C. 3583(h), to serve a term of reimprisonment followed by additional supervised release outside prison.

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OPINION BELOW

The order of the court of appeals (J.A. 48-49) is unpublished, but the decision is noted at 181 F.3d 105 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. The petition for a writ of certiorari was filed on July 2, 1999, and was granted on October 18, 1999. J.A. 50. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution, Article I, Section 9, Clause 3, provides that "[n]o * * * ex post facto Law shall be passed" by Congress.

Reproduced in Appendix A to this brief is the version of 18 U.S.C. 3583 in effect on October 22, 1993, when petitioner committed his offense. Appendix B reproduces the version of 18 U.S.C. 3583 in effect on April 30, 1998, when the district

court revoked petitioner's supervised release, and also currently in effect.[1]

STATEMENT

After his three-year term of supervised release was revoked by the United States District Court for the Eastern District of Tennessee, petitioner was ordered to serve 18 months in prison, followed by another 12 months on supervised release. Petitioner also lost all credit for the time he had already spent outside prison on supervised release. J.A. 38-41. The court of appeals affirmed. J.A. 48-49.

1. a. This case involves a claim that the Ex Post Facto Clause precluded the district court, on revoking petitioner's supervised release, from ordering petitioner, under 18 U.S.C. 3583(h), to serve a term of reimprisonment followed by additional supervised release outside prison. Section 3583(h) was enacted by Congress after the date of petitioner's offense, October 22, 1993. Accordingly, it is necessary to compare the pertinent statutes as they were in effect on the date of petitioner's offense and on the date on which his supervised release was revoked, April 30, 1998.

b. Supervised release was introduced into the federal criminal justice system as part of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1999. The Sentencing Reform Act provides that a district court, "in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. 3583(a). The statute sets forth maximum permissible periods of supervised release, generally connected to the

[1] Unless otherwise indicated, all citations in this brief to Title 18 of the United States Code without further edition information are to the version in effect on April 30, 1998. Citations in this brief to 18 U.S.C. 3583 as in effect on the date of petitioner's offense are set forth as 18 U.S.C. 3583 (1988 & Supp. IV 1992).

class of the offense for which the defendant was convicted, see 18 U.S.C. 3583(b);[2] the class of the offense in turn is defined by the maximum term of imprisonment authorized by statute for the offense, see 18 U.S.C. 3559(a). Although supervised release is therefore part of an offender's criminal sentence, and the duration of the term of supervised release is tied to the seriousness of the offense, the "primary goal" of supervised release is nonetheless not punishment, but rather "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs

[2] Under Section 3583, as in effect both at the time of petitioner's offense and at present, an offender convicted of a Class A or Class B felony is subject to a maximum supervised release term of five years; one convicted of a Class C or Class D felony is subject to a maximum supervised release term of three years; and one convicted of a Class E felony or misdemeanor (other than a petty offense) is subject to a maximum supervised release term of one year. See 18 U.S.C. 3583(b).

There is an important exception that is not at issue in this case. Certain narcotics offenses defined in Title 21 require *minimum* terms of supervised release. See, *e.g.*, 21 U.S.C. 841(b)(1)(A) (flush paragraph) (minimum terms of five and ten years' supervised release); 21 U.S.C. 841(b)(1)(B) (flush paragraph) (minimum terms of four and eight years' supervised release); 21 U.S.C. 841(b)(1)(C) (1994 & Supp. III 1997) (flush paragraph) (minimum terms of three and six years' supervised release); 21 U.S.C. 841(b)(1)(D) (1994 & Supp. III 1997) (minimum terms of two and four years' supervised release). The courts of appeals have reached differing conclusions as to whether and in what circumstances those provisions requiring "at least" the specified minimum terms of supervised release might override the maximum periods set forth in Section 3583(b) and authorize a maximum of life supervised release. Compare *United States* v. *Good*, 25 F.3d 218, 220-221 (4th Cir. 1994), and *United States* v. *Kelly*, 974 F.2d 22, 24 (5th Cir. 1992), with *United States* v. *LeMay*, 952 F.2d 995, 998 (8th Cir. 1991), *United States* v. *Eng*, 14 F.3d 165, 172-173 (2d Cir.), cert. denied, 513 U.S. 807 (1994), *United States* v. *Orozco-Rodriguez*, 60 F.3d 705, 707-708 (10th Cir. 1995), and *United States* v. *Garcia*, 112 F.3d 395, 397- 398 (9th Cir. 1997); see also *United States* v. *Shorty*, 159 F.3d 312, 316 n.6 (7th Cir. 1998), cert. denied, 119 S. Ct. 2024 (1999).

after release." S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983).

Section 3583 requires the district court to impose, as a condition of supervised release, a requirement that the offender not commit any federal, state, or local crime during the term of supervision. 18 U.S.C. 3583(d).[3] Congress also granted the district court authority to impose certain discretionary conditions on an offender's supervised release (generally those also authorized as discretionary conditions of probation),[4] to the extent that such conditions satisfy certain policy objectives identified in the Sentencing Reform Act as proper sentencing factors.[5] 18 U.S.C. 3583(d). In addition to those discretionary conditions, Section 3583(d) permits the court to impose "any other condition it considers to be appropriate." 18 U.S.C. 3583(d).

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[3] Congress has also required that the offender not unlawfully possess any controlled substance. 18 U.S.C. 3583(d).

[4] Section 3583(d) identified permissible discretionary conditions of supervised release by cross-referencing some of the discretionary conditions authorized for probation under 18 U.S.C. 3563(b). One permissible condition of probation (and, by cross-reference, supervised release as well) is that the offender "remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer." 18 U.S.C. 3563(b)(14).

[5] Under Section 3583(d), a discretionary condition of supervised release is authorized to the extent that such a condition "(1) is reasonably related to the factors set forth in section 3553(a)(1) ['the nature and circumstances of the offense and the history and characteristics of the defendant'], (a)(2)(B) ['to afford adequate deterrence to criminal conduct'], (a)(2)(C) ['to protect the public from further crimes of the defendant'], and (a)(2)(D) ['to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner']; (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)." 18 U.S.C. 3583(d) (interpolating cross-referenced language of 18 U.S.C. 3553). Section 3553 sets forth factors that the court is to consider in determining the particular criminal sentence to be imposed in any case.

Congress also provided the district court with authority to review an offender's compliance with the conditions of a term of supervised release, and to adjust those conditions based on that review. Under Section 3583(e) as in effect at the time of petitioner's offense, a district court, based on its review of the offender's record of compliance, could take any of the following actions:

> (1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if [the court] is satisfied that such action is warranted by the conduct of the person released and the interest of justice;
>
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and [the court] may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of the probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
>
> (3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if [the court] finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is

revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony;[6] or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

18 U.S.C. 3583(e) (1988 & Supp. IV 1992).

c. As noted above, Section 3583(e)(3) as it existed at the time of petitioner's offense authorized the district court to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-

[6] Section 3583(e)(3) was originally enacted as Section 3583(e)(4). An earlier Section 3583(e)(3), authorizing the district courts to treat a violation of supervised release as a contempt of court, was deleted before petitioner committed his offense. See Pub. L. No. 99-570, Tit. I, § 1006(a)(1), 100 Stat. 3207-6; Pub. L. No. 100-182, § 25, 101 Stat. 1272; Pub. L. No. 100-690, Tit. VII, § 7108(b), 102 Stat. 4419.

Congress initially placed no specific statutory cap on the permissible period of reimprisonment for Class A felony offenders. See Pub. L. No. 100-182, § 25, 101 Stat. 1272. All offenders were, however, always subject to the original, generally applicable limit that the term of reimprisonment be no greater than the offender's term of supervised release. See 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992) (district court authorized to "require the person to serve in prison all or part of the term of supervised release"). In 1994, Congress enacted a five-year limitation on the permissible period of reimprisonment for Class A felony offenders. Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2016-2017. Congress also at that time permitted the district court to order any defendant to serve in prison on all or part of the period of supervised release *authorized by statute* for his offense (as opposed to the term of supervised release actually imposed by the district court at the defendant's initial sentencing). *Ibid.*; see p. 9 n.8, *infra*.

release supervision" (subject to further maximum periods of reincarceration). The courts of appeals reached conflicting views on whether Section 3583(e) authorized a district court to order an offender who violated the conditions of his supervised release to serve a new period of supervised release following completion of any term of reincarceration imposed upon revocation of the initial term of supervised release. Some courts of appeals agreed with the government that, when a district court revoked an offender's initial term of supervised release, it could order the offender to serve time in prison and also, after the prison term, further time on supervised release. Other courts, however, concluded that, if a district court revoked a defendant's supervised release and ordered him to serve time in prison, the court was required to discharge him upon completion of the prison term without any further restraints on his liberty outside prison.[7]

A division of authority had already emerged by the time of petitioner's offense. The Sixth Circuit had ruled that "a district court does *not* have the power to impose an additional term of supervised release following a defendant's incarceration for violating the conditions of his original

[7] The First and Eighth Circuits ruled that sentencing courts had the power, upon revocation of supervised release, to order the person to serve part of the original term of supervised release in prison followed by continued supervised release, but other circuits disagreed and found no authority to order the person to serve continued supervised release after release from prison. Compare *United States* v. *O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993), and *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992), with *United States* v. *Koehler*, 973 F.2d 132, 134-136 (2d Cir. 1992), *United States* v. *Malesic*, 18 F.3d 205, 206 (3d Cir. 1994), *United States* v. *Cooper*, 962 F.2d 339, 341-342 (4th Cir. 1992), *United States* v. *Holmes*, 954 F.2d 270, 272-273 (5th Cir. 1992), *United States* v. *Truss*, 4 F.3d 437, 439 (6th Cir. 1993), *United States* v. *McGee*, 981 F.2d 271, 274-276 (7th Cir. 1992), *United States* v. *Behnezhad*, 907 F.2d 896, 898-899 (9th Cir. 1990), *United States* v. *Rockwell*, 984 F.2d 1112, 1116-1117 (10th Cir.), cert. denied, 508 U.S. 966 (1993), and *United States* v. *Tatum*, 998 F.2d 893, 895-896 (11th Cir. 1993).

release." *United States* v. *Truss*, 4 F.3d 437, 439 (1993). The Eighth Circuit, however, had already held that, "if a district court finds that an offender has violated the terms of his supervised release, the district court can * * * require the offender to serve a portion of the time remaining on the term of supervised release in prison and the remaining time on supervised release." *United States* v. *Schrader*, 973 F.2d 623, 625 (1992). The Tenth Circuit had already changed its position, first agreeing with the government, see *United States* v. *Boling*, 947 F.2d 1461 (1991), and then disagreeing, see *United States* v. *Rockwell*, 984 F.2d 1112, cert. denied, 508 U.S. 966 (1993). One panel of the Eleventh Circuit had disagreed with the government, see *United States* v. *Tatum*, 998 F.2d 893 (1993), but another panel, writing only two weeks later, agreed with the government, described the *Tatum* holding as "contrary to common sense," but accepted *Tatum* as binding precedent and declined to request en banc consideration because Congress was "in the process of curing the problem caused by the interpretation placed upon [Section 3583(e)(3)] by the several circuit courts of appeal," see *United States* v. *Williams*, 2 F.3d 363, 365 (1993).

d. To resolve the conflict among the courts of appeals over the district court's authority to impose both prison time and renewed supervised release upon revoking an offender's supervised release, Congress enacted Section 3583(h) on September 13, 1994. Section 3583(h) provides:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2017. Section 3583(h) makes clear that, when a court revokes an offender's supervised release, it may order him to serve part of the term authorized for supervised release in prison and may *also* order him to serve further time on continued supervised release after he is released from reincarceration.[8] The limitations on that authority to order renewed supervised release following a period of reincarceration are that (a) the period of reincarceration imposed must be less than the maximum that could have been imposed, and (b) the total period of restraint on the offender's liberty following revocation of supervised release—the term of reimprisonment plus the term of renewed supervised release—must be no greater than the term of supervised release authorized by statute for the offense. In effect, Section 3583(h) makes clear that, when a court revokes a term of supervised release, it resets the conditions of supervised release as if *ab initio*, and may divide the period authorized by statute for

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[8] In 1994, Congress also amended Section 3583(e)(3) to authorize the district court to order that an offender whose supervised release is revoked to serve in prison all or part of the term of supervised release "authorized by statute for the offense," rather than the term of supervised release initially imposed on a particular offender by the district court in its initial sentence. That change has no relevance for this case, because the term of supervised release imposed in petitioner's initial sentence, three years, was also the maximum authorized by statute for his offense.

Congress also amended an earlier version of Section 3583(g), which had required the district court to "terminate" an offender's supervised release if he is found to be in unlawful possession of a controlled substance. As amended, Section 3583(g) now requires the district court to "revoke," rather than "terminate," supervised release in such a case. Section 3583(g) also broadened the triggering circumstances for mandatory revocation of supervised release to include circumstances in which the defendant unlawfully possesses a firearm or refuses to comply with drug testing requirements. See 18 U.S.C. 3583(g).

supervised release between time in prison and time outside prison.[9]

2. a. On or about October 22, 1993—before Section 3583(h) was enacted—petitioner committed the offense of conspiracy to produce, use, and traffic in one or more counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. 1029(b)(2). Petitioner's offense was a Class D felony.[10]

On March 8, 1994, after a guilty plea, petitioner was convicted of the conspiracy offense in the United States District Court for the Eastern District of Tennessee. J.A. 4-8. The district court sentenced petitioner to 25 months' imprisonment, to be followed by three years' supervised release (the maximum amount of supervised release permitted under Section 3583(b) for a Class D felony). J.A. 9-10. Among the conditions of petitioner's supervised release was a requirement that he not commit any federal, state, or local crime while on release (J.A. 10) and a requirement that petitioner not leave the judicial district without the permission of the court or the probation officer (J.A. 12).

Petitioner began to serve his sentence on the date of sentencing. He was released from imprisonment (after receiving good-conduct credits) on August 14, 1995, and upon release began to serve his three-year term of supervised release. Had petitioner not violated the conditions of his supervised release, it would have expired on August 13, 1998. J.A. 18.

On March 3, 1996, less than seven months after commencing his term of supervised release, petitioner was arrested in Virginia on state charges of fraud and uttering a

[9] Both before and after the 1994 amendments, Section 3583(e)(3) provided that a defendant whose supervised release is revoked loses credit for all time previously served on postrelease supervision.

[10] The penalty applicable to petitioner's conspiracy offense is prescribed in 18 U.S.C. 1029(b)(2) and (c)(1)(A)(i) as up to five years' imprisonment. That penalty classifies the conspiracy offense as a Class D felony. See 18 U.S.C. 3559(a)(4).

forged instrument. J.A. 18-19. Petitioner remained in state custody from the time of his arrest throughout his state trial. See J.A. 34. On July 25, 1996, petitioner was convicted of the state offenses of forgery and uttering a forged instrument, and on the following day he was convicted of the state offenses of obtaining money by false pretenses and larceny by false pretenses. J.A. 33-34. The state court sentenced him to terms of imprisonment of ten years for each of the first two offenses and one year for each of the latter two offenses, but suspended execution of nine years of the first ten-year sentence and nine and one-half years of the second ten-year sentence. *Ibid.*

On March 5, 1996, two days after petitioner's arrest on state charges in Virginia, the United States Probation Office filed a Petition for Warrant or Summons for Offender Under Supervision against petitioner, which was the first step toward revoking his supervised release.[11] J.A. 17-19. The violations of supervised release alleged in the petition were the commission of the Virginia offenses and leaving the Eastern District of Tennessee without permission. J.A. 18-19. A federal detainer was lodged in Virginia against peti-

[11] The district court may initiate a revocation proceeding on its own motion based on information obtained from any source. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400-401 (1991) ("Under the Sentencing Reform Act's provisions for supervised release, the sentencing court, rather than the Parole Commission, would oversee the defendant's postconfinement monitoring."). The matter is usually initiated by the offender's probation officer, who has the responsibility to "keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court." 18 U.S.C. 3603(2). The United States Attorney's Office usually participates in the proceeding, but there is no requirement that revocation of supervised release be initiated by the federal prosecutor. See *United States* v. *Davis*, 151 F.3d 1304, 1307 (10th Cir. 1998); *United States* v. *Feinberg*, 631 F.2d 388, 390-391 (5th Cir. 1980).

tioner, who remained in state custody until March 31, 1998, when he was released to federal authorities. J.A. 34.

The dispositional report prepared by the Probation Office for the hearing on the revocation of petitioner's supervised release noted that petitioner had been originally convicted of a Class D felony, and that he had a criminal history of category V. Under the pertinent statutory provision limiting the amount of time that the district court could order petitioner to serve in prison after revoking his supervised release, see 18 U.S.C. 3583(e)(3) (two years maximum reimprisonment for Class D felony), and non-binding Policy Statements issued by the Sentencing Commission addressing prison terms following revocation of supervised release, see Sentencing Guidelines §§ 7B1.3(a)(1), 7B1.4, petitioner was subject to a term of imprisonment following revocation of supervised release of 18-24 months. J.A. 31-32. The Probation Office's report also observed that the district court was authorized under Section 3583(h) to "reimpose supervised release after revocation, * * * provided that any term of imprisonment that the defendant is ordered to serve is less than the maximum term of imprisonment authorized by statute under [Section] 3583(e)(3)." J.A. 31-32.

On April 30, 1998, at a hearing on the revocation of his supervised release in the Eastern District of Tennessee before the original sentencing judge, petitioner admitted the alleged violations of his supervised release. J.A. 21-22. The district court thereupon revoked petitioner's supervised release. The court noted that, under the Sentencing Commission's Policy Statements, the term of imprisonment applicable to petitioner's case was 18-24 months. J.A. 23. The court also remarked that "there is a need, at least a short one, to protect the public from the kind of activity that [petitioner has] engaged in." J.A. 25. The court therefore ordered petitioner to serve the minimum amount of that range, 18 months, in prison, to be followed by 12 months of

further supervised release outside prison. J.A. 26, 40-41.[12] Petitioner began to serve his term of prison immediately.

b. Petitioner appealed the revocation of his supervised release, contending that the application of Section 3583(h) to his case violated the Ex Post Facto Clause. The court of appeals affirmed. J.A. 48-49. The court relied (J.A. 49) on circuit precedent which had held that the application of Section 3583(h) to the case of an offender whose underlying crime was committed before Section 3583(h) was enacted was not retroactive at all. That precedent had reasoned that Section 3583(h) "does not alter the punishment for defendant's original offenses; [S]ection 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release—offenses they committed after [S]ection 3583(h) was passed." *United States* v. *Page*, 131 F.3d 1173, 1176 (6th Cir. 1997), cert. denied, 119 S. Ct. 77 (1998).

c. After receiving good-conduct credits, petitioner was released from prison on July 7, 1999, and began serving his 12 months of renewed supervised release. In the absence of further action by the district court, petitioner's term of supervised release will be completed on July 6, 2000.

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[12] The district court did not expressly refer to Section 3583(h) as authority for requiring petitioner to serve 12 more months on supervised release outside prison. In context, however, it does appear that the court relied on Section 3583(h), rather than Section 3583(e)(3), which had previously been construed by the Sixth Circuit not to authorize sentencing courts, upon revoking supervised release, both to order the offender to serve a term of imprisonment and to require additional supervised release outside. See pp. 7-8, *supra*. Defense counsel lodged an objection based on the Ex Post Facto Clause to the order imposing 12 months of further supervised release, and the district court noted that that Ex Post Facto Clause challenge (presumably, given the context, to Section 3583(h)) had already been rejected by the Sixth Circuit. J.A. 27-28.

SUMMARY OF ARGUMENT

A. The Ex Post Facto Clause did not preclude the district court, upon revoking petitioner's supervised release, from exercising its authority under 18 U.S.C. 3583(h) to order petitioner to serve a new term of supervised release outside prison after his term of reimprisonment. To fall within the proscription of the Ex Post Facto Clause, a new law must disadvantage the offender by making him subject to a punishment that is more onerous than the punishment for the offense under prior law. Section 3583(h) does not contravene that proscription, because even before it was enacted, district courts had the authority under 18 U.S.C. 3593(e)(3) (1988 & Supp. IV 1992) to order offenders to serve a term of reimprisonment followed by a renewed term of supervised release.

Although, by the time petitioner committed his offense, the Sixth Circuit had ruled that district courts revoking supervised release did not have the authority under Section 3583(e)(3) to impose both reimprisonment and renewed supervised release, this Court is not bound by that determination. Petitioner's claim under the Ex Post Facto Clause requires the Court to compare federal law at two different times. That comparison should be made between two correct determinations of the state of the law. This Court's construction of Section 3583(e)(3) is necessarily the correct one, even if the Sixth Circuit had ruled to the contrary before the offense took place. Nor would it be unfair to apply this Court's accurate construction of Section 3583(e)(3) to petitioner, because even at the time of his offense, the circuits had reached differing conclusions about the district courts' authority, and petitioner thus had fair notice of the possibility that this Court might resolve the conflict and render a ruling unfavorable to him.

The text, purpose, and background of Section 3583(e)(3) as in effect at the time of petitioner's offense show that district

courts had the authority, when revoking supervised release, to order both reimprisonment and renewed supervised release. Congress's use of the term "revoke" in this context, which is to be contrasted with its use elsewhere of the term "terminate" (there meaning "extinguish"), indicates that Congress did not believe that a "revoked" term of supervised release was entirely annulled. Rather, Congress authorized the district courts to call back the term of supervised release and reimpose it as if *ab initio*. Congress also directed the district courts to order the offender to "serve in prison all or part of the term" of supervised release after it was revoked. That locution indicates that Congress understood that, even after an offender's supervised release term was "revoked," a term of supervised release existed, even though "all or part" of that term had to be "serve[d] in prison." That construction also makes sense of Congress's direction that offenders whose supervised release was revoked should lose credit for all time spent on supervised release before its revocation.

Our construction also accords with the dominant purpose of supervised release, to afford offenders assistance in reintegration into society and rehabilitation. The authority to revoke supervised release and impose new sanctions is among a range of powers granted to the district courts to oversee an offender's progress on supervised release. A district court may, for example, intensify the conditions of supervised release if it believes the offender is having trouble readjusting to society, or it may terminate supervised release early if it believes the offender has made a successful transition. So too here, a district court may determine that an offender needs a brief period of reincarceration, followed by a new opportunity for successful reintegration with the assistance of probation officers. It would ill serve Congress's policies to deny the district courts discretion to impose supervised release on those offenders who need it the most.

The background of supervised release, in probation, parole, and special parole before enactment of the Sentencing Reform Act of 1984, confirms our construction. Under all three forms of nondetentive monitoring, a court, after revoking the supervision and directing reincarceration, could order a new period of similar nondetentive monitoring. Nothing in the supervised release statute indicates that Congress intended to depart from that practice.

B. If the Court concludes that Section 3583(e)(3) did not authorize the district court to order petitioner to serve a renewed term of supervised release outside prison after revoking his supervised release, then the case should be remanded to the district court. This Court's ex post facto decisions have generally looked to the standard of punishment imposed by penalty provisions, rather than the actual penalty imposed on an offender, to determine whether the new law is more onerous than old law and thus inapplicable to pre-enactment offenses. The Court's previous cases, however, involved situations where the legislature increased the minimum penalty authorized for an offense, not a case like this one, where the minimum penalty remained the same but the maximum penalty authorized was elevated. The ex post facto considerations in the latter situation may be different where the offender is sentenced within the range authorized under prior law.

Nonetheless, this case does not present a circumstance for the Court to determine whether any different ex post facto analysis should be applied in such a case. It cannot be stated with confidence that petitioner received a sanction within the range authorized under petitioner's version of prior law. Although the total amounts of supervised release and reimprisonment that petitioner has actually served are less than the maximum amounts he might have expected to serve when he committed his offense, he has served them in a sequence not authorized under prior law. And when the

district court revoked petitioner's supervised release, it imposed a total restraint on petitioner's liberty (combined reimprisonment and supervised release) longer than the total duration of reimprisonment authorized under prior law. Accordingly, if the Court accepts petitioner's construction of Section 3583(e)(3), the proper remedy is for the Court to order the case remanded to the district court.

ARGUMENT

THE DISTRICT COURT'S ORDER UNDER 18 U.S.C. 3583(h) REQUIRING PETITIONER TO SERVE A RENEWED PERIOD OF SUPERVISED RELEASE OUTSIDE PRISON AFTER HIS PERIOD OF REINCARCERATION DOES NOT VIOLATE THE EX POST FACTO CLAUSE

A. Even Before Section 3583(h) Was Enacted, District Courts Had The Authority, When Revoking Supervised Release, To Order An Offender To Serve A Renewed Period Of Supervised Release Outside Prison After A Period Of Reincarceration

"To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) (internal quotation marks and citation omitted). This case concerns only the second of those conditions; we do not contend here that Section 3583(h) is not "retrospective" in the sense of not applying to petitioner's original criminal conduct.[13] We do submit, however,

[13] We therefore do not agree with the reasoning of the Sixth Circuit that Section 3583(h) satisfies Ex Post Facto Clause scrutiny in this case simply because it was passed before petitioner violated the conditions of his supervised release. See J.A. 49; *Page*, 131 F.3d at 1175. In our view, the Sixth Circuit's statement in *Page* (*ibid.*) that Section 3583(h) "imposed a new sentence for the later misconduct of violating the terms of the

that Section 3583(h) does not disadvantage petitioner, because even before that provision was enacted, the district courts already had the authority, when revoking an offender's supervised release, to order the offender to serve a term of incarceration followed by a renewed period of supervised release, if the combined period was no greater than the original period of supervised release imposed on the offender. Thus, even under prior law, the district court could have ordered petitioner to serve a combined period of reincarceration (subject to a maximum of two years) followed by further supervised release, totaling three years (the period of supervised release initially imposed on petitioner, and the statutory maximum period as well).

1. In Determining The State Of The Law Before Section 3583(h) Was Enacted, This Court Should Make An Independent Construction Of Section 3583(e), Rather Than Accept The Sixth's Circuit's Prior Construction As Controlling

A challenge to a statute under the Ex Post Facto Clause requires the Court to compare the state of the law before passage of the challenged statute and that afterwards, to determine whether the new provision has altered the law in a way to make it the criminal penalty applicable to the defendant's offense more onerous. See *Weaver* v. *Graham*, 450 U.S. 24, 30-31 (1981) (a new law violates the Clause "if it is both retrospective and more onerous than the law in effect on the date of the offense"). This Court should make an

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supervised release, and therefore it did not extend the original sentence for the original offense," is inaccurate. Whether or not the application of Section 3583(h) in a case like this one to require a new period of supervised release outside prison might be described as imposing a "new sentence" for a post-enactment violation of supervised release (which need not be a criminal offense), it also constitutes part of the penalty for the original offense. Indeed, imprisonment for a violation of supervised release (which is established before the district court by a preponderance of the evidence, see 18 U.S.C. 3583(e)(3)), is justified only on that basis.

independent determination whether, even before enactment of Section 3583(h), Section 3583(e) itself authorized the district courts to order an offender to serve both a period of reimprisonment and a subsequent period of renewed supervised release; it should not simply accept the Sixth Circuit's position—which had already been announced at the time petitioner committed his offense—that district courts in that circuit did not have such authority under Section 3583(e). See pp. 7-8, *supra* (discussing Sixth Circuit's decision in *United States* v. *Truss*, 4 F.3d 437 (1993)).

Before Congress enacted Section 3583(h), this Court had not decided whether other provisions of the supervised release statute, including Section 3583(e), authorized the district courts to order both a period of imprisonment and a new period of supervised release outside prison when revoking supervised release. Moreover, the lower courts had already registered disagreement on that question by the time petitioner committed his offense. See pp. 7-8, *supra*. At the time of the offense, therefore, there was no definitive judicial construction of Section 3583(e) answering that question. Only this Court can finally resolve whether Section 3583(e) provided the district courts with such authority: "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).

If this Court *now* concludes that Section 3583(e) provided the district courts with authority to order both reimprisonment and renewed supervised release, it will be irrelevant that the Sixth Circuit might have previously concluded to the contrary. Once this Court renders a definitive construction of Section 3583(e), that construction "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-313. "[W]hen this Court construes a

statute, it is explaining its understanding of what the statute has meant continuously since the date it became law." *Id.* at 313 n.12; see also *Bousley* v. *United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part).

A contrary approach, requiring this Court to accept the Sixth Circuit's construction of Section 3583(e), would have undesirable consequences. First, it would prevent the uniform application of Section 3583(h) across the country. Because the First and Eighth Circuits had previously accepted the government's construction of Section 3583(e), there can be no Ex Post Facto Clause objection to the application of Section 3583(h) in those circuits to an offender similarly situated to petitioner, convicted of the same offense and initially sentenced to the same terms of prison and supervised release.[14] But either Section 3583(h) is an ex post facto law as applied to one in petitioner's situation or it is not; the constitutionality of the law cannot depend on the offender's location.[15] And either the law before Section 3583(h) was enacted permitted both a period of imprisonment and a new period of supervised release outside prison or it did not. The answer depends on this Court's construction of Section 3583(e) as in effect at the time of petitioner's offense.

Second, if (as we submit) the law before Section 3583(h) was enacted did authorize the district courts to order both

[14] See *United States* v. *St. John*, 92 F.3d 761, 765-767 (8th Cir. 1996) (holding that Section 3583(h) is not an ex post facto law because it did not change the law in that circuit).

[15] Moreover, it would be unclear what rule should be applied in the case of an offender who, during his initial period of supervised release, moved (with the district court's permission) from a circuit that had previously rejected the government's construction of Section 3583(e) to one that had accepted it (or vice versa), and then violated a condition of his supervised release. One such case is pending before the Court. See U.S. Br. at 5-6, *Marlow* v. *United States*, No. 99-6879 (noting that defendant moved from Sixth Circuit to Eighth Circuit while on supervised release).

reimprisonment and renewed supervised release, then a rule requiring this Court to accept the lower courts' prior contrary interpretations of Section 3583(e) would result in a windfall to defendants in those circuits that had construed Section 3583(e) incorrectly.[16] Since the Ex Post Facto Clause requires a comparison between the states of the law at two different times, defendants should not be allowed to rely on a decision about the state of prior law that is, in fact, incorrect. Rather, the Court should make a comparison between two accurate and definitive determinations about the state of the law before and after enactment of Section 3583(h).[17]

[16] Cf. *Lockhart* v. *Fretwell*, 506 U.S. 364, 370 (1993) (Sixth Amendment should not be construed to grant the defendant "a windfall to which the law does not entitle him"; ineffective assistance of counsel claim could not be based on counsel's failure to make objection that would have been supported by lower court decision that was subsequently overruled); *id.* at 373 (O'Connor, J., concurring) (ineffective assistance of counsel claim should not be "based on considerations that, as a matter of law, ought not inform the inquiry").

[17] The Court followed a somewhat analogous approach in *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993). In that case, the Ninth Circuit initially construed a standard contract between the federal government and private landlords covering rent increases for government-subsidized housing for low-income tenants in a manner adverse to the government, prohibiting the government from using independent market comparability studies to limit payments to landlords to prevailing market rents for comparable housing. This Court denied the government's petition for a writ of certiorari. Congress then enacted a statute expressly permitting the government to limit rent adjustments to prevailing market rents as determined by comparability studies. The Ninth Circuit invalidated the statute under the Due Process Clause, concluding that it impermissibly impaired the landlords' vested rights to rent increases under that court's previous interpretation of the contract. This Court reversed. In doing so, the Court rejected the premise of the Ninth Circuit's decision, that the contract between the government and the landlords prohibited the use of market comparability studies to limit rent increases. *Id.* at 17-21. Having rejected that premise, the Court had no occasion to determine whether the challenged statute unconstitutionally affected any vested rights. Thus, this Court did not defer to the court of appeals' prior, incorrect

It is true that, by the time petitioner committed his offense, the Sixth Circuit, where that offense took place, had already rejected the government's construction of Section 3583(e). The Court has stated that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997); see *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964) (due process prevents retroactive application of "an unforeseeable judicial enlargement of a criminal statute").[18] But when petitioner committed his offense, one circuit had already accepted the government's construction, one circuit had initially done so but had then changed position, and one circuit had issued conflicting decisions, first rejecting the government's position and then endorsing it as well-reasoned but not adopting it because of circuit precedent. See pp. 7-8, *supra*. The language of the statute itself (as we explain, pp. 24-26, *infra*) also gave petitioner notice of the government's construction. Petitioner therefore cannot complain that he would be unfairly surprised by a decision of this Court definitively construing Section 3583(e) in a manner different than the Sixth Circuit's decision in *Truss*.[19]

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determination of the contractual obligation between the government and the landlords, even before the curative statute was enacted, but construed the contract independently.

[18] This Court has also held that its cases overruling its *own* past decisions and expanding the permissible basis of criminal liability are not to be applied retroactively. See *Marks* v. *United States*, 430 U.S. 188, 194-195 (1977) (holding that *Miller* v. *California*, 413 U.S. 15 (1973), which overruled *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and permitted greater criminal proscription of obscenity, could not be applied retroactively). This case, of course, does not involve such a situation.

[19] See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) (after accepting government's construction of 18 U.S.C. 1001, Court rejected argument that applying that construction to the case before it would be unfair, even though the court of appeals had rejected the government's construction

2. Section 3583(e) As In Effect At The Time Of Petitioner's Offense Authorized The District Court To Order Reincarceration Followed By Renewed Supervised Release

Section 3583(e)(3), as in effect at the time of petitioner's offense, authorized a district court, upon finding that an offender violated a condition of supervised release, to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). The authority to revoke supervised release was one of four kinds of powers provided to the district courts overseeing a defendant's supervised release, stated in the disjunctive.

The Sixth Circuit concluded in *Truss* that, when a district court "revoke[d]" an offender's initial term of supervised release under Section 3583(e)(3), it was required to annul the defendant's supervised release entirely and to order the defendant to serve all or part of his term of supervised release in prison, without the possibility of ordering the defendant to submit to a relatively short period in prison followed by a renewed period of supervised release. See 4 F.3d at 439. The Sixth Circuit reached that conclusion even though it recognized that "an additional term of supervised release may be in the best interests of an orderly administration of justice," *ibid.*; see also *id.* at 442 (acknowledging its construction produced an "anomalous result"), and even though a panel of the Eleventh Circuit had found that construction of Section 3583(e)(3) to be "contrary to common sense," *Williams*, 2 F.3d at 365. As we now show, the text, purpose, and background of Section 3583(e) contradict the Sixth Cir-

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before the crime took place, because "the existence of conflicting cases from other Courts of Appeals" at the time of offense "made review of that issue by this Court and decision against the position of the [defendant] reasonably foreseeable").

cuit's construction in *Truss*. See generally *United States* v. *O'Neil*, 11 F.3d 292 (1st Cir. 1993) (offering persuasive construction of Section 3583(e).

a. *The text of Section 3583(e)*

The Sixth Circuit's construction of Section 3583(e) in *Truss* was based largely on its view that, when a court "revokes" a defendant's supervised release, the term of supervised release must be entirely terminated, and the court's power to order supervised release for that particular defendant is extinguished. See 4 F.3d at 439-441. Although "revoke" in some contexts does mean "terminate" or "extinguish," the word can assume a different meaning in other contexts. Cf. *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). The statutory context of Section 3583(e)(3) favors the interpretation that "revoke" as used there means "to call back" or "to undo." See *Black's Law Dictionary* 1322 (6th ed. 1990) (defining "revoke" as "[t]o annul or make void by recalling or taking back"); *O'Neil*, 11 F.3d at 295-296. And "[i]f a term has been called back, it may be reimposed." *Ibid.* Section 3583(e)(3) therefore authorizes the court to undo the course of supervised release thus far followed and to reformulate it, as if *ab initio*, including a condition that the person serve "all or part of the term of supervised release" in prison and the rest outside of prison under continued supervision.

The first indication that Congress intended "revoke" to mean something other than "terminate" is that Congress separately used the word "terminate" in Section 3583(e)(1), where it granted the court authority to "terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release." Had Congress intended that the effect of revocation under Section 3583(e)(3) would be to extinguish completely the initial term of supervised release and substitute imprisonment, then it more likely would have used the term, "terminate," or a close synonym, instead of "revoke."[20]

A second indication of Congress's meaning is found in its description of the consequence of a revocation under Section 3583(e)(3): the court may "require the person to serve in prison all or part of *the term* of supervised release." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992) (emphasis added). The reference to "the term" of supervised release would be meaningless if the act of revocation had entirely eliminated the district court's authority to place the offender on supervised release; in that event, "the term" of supervised release could no longer exist. See *O'Neil*, 11 F.3d at 295 (observing that "the supervision term recommenced upon revocation—else there would be no term then in existence" before the offender to serve in prison). The implication of Congress's use of the phrase "the term" of supervised release is that such a term continues to exist even after the district court has "revoke[d]" the initial term of supervised release.[21]

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[20] Congress also used the word "terminate" in the original version of Section 3583(g), which was in effect when petitioner committed his underlying offense. That version of Section 3583(g) provided that, if the person on supervised release is found to possess a controlled substance, "the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." 18 U.S.C. 3583(g) (1988 & Supp. IV 1992). Subsequently, however, Congress apprehended that the term "terminate" was inappropriate in that context, for it amended Section 3583(g) to change the terminology from "terminate" to "revoke." See Pub. L. No. 103-322, Tit. IX, § 110505, 108 Stat. 2017.

[21] As noted above (p. 9 n.8, *supra*), in 1994 Congress amended Section 3583(e)(3) to provide that the district court, on revoking supervised release, may require an offender to serve in prison all or part of the term of supervised release "authorized by statute for the offense" for which he was convicted, not just all or part of "the term" of supervised release to which the offender had originally been sentenced. See Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2016.

Third, Congress provided that a district court may order a defendant whose supervised release is revoked to "serve in prison" all or part of the term of supervised release. 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). If Congress had intended the revocation proceeding to end supervised release completely, Congress would more likely have provided that the district court should "order the person imprisoned." The implication of Section 3583(e)(3) as in effect in 1993, therefore, is that the defendant was to be ordered to serve his term of supervised release, which term was still in existence, in prison, not that the supervised release term was to be extinguished.

Fourth, Congress specified that a defendant whose supervised release was revoked would lose "credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). If the intended effect of revocation was to extinguish the original supervised-release term and substitute a term of imprisonment, then there would be no reason to specify that the person lost credit. The extinguishment of the original term of supervised release would eliminate the question of credit. But if the district court has the authority to call back and reformulate the term of supervised release, then it is important to specify whether the defendant should receive credit for the time already spent on supervised release.

All of these features of Section 3583(e)(3) readily make sense if the meaning of "revoke" is that the court calls back the original term of supervised release and requires the person to redo it, starting with a condition that he serve part of his supervised-release term in prison. Those features do not make sense if "revoke" in this context must be read to mean "extinguish."

b. *The purpose of supervised release*

Our construction of Section 3583(e)(3) is consistent with the dominant purpose of supervised release, which is to provide assistance to an offender released from prison in his reintegration into society and rehabilitation. See pp. 3-4, *supra*. In this respect Section 3583(e)(3) should be considered together with the other powers granted to the district court in Section 3583(e), all of which are designed to ensure a successful transition for the defendant from prison to society outside prison. Those other powers show that the district court was granted a continuing supervisory authority, during the entire period of supervised release, to monitor the progress of the offender and to adjust the conditions of supervised release to assure his successful reentry into the community. Under Section 3583(e)(2), for example, the court, "at any time prior to the expiration or termination of the term of supervised release," may "extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release." 18 U.S.C. 3583(e)(2) (1988 & Supp. IV 1992). There is no triggering requirement that the court find a violation of the conditions of supervised release. Rather, the court may, in its discretion, extend the term or enlarge the conditions "at any time."[22] Likewise, under Section 3583(e)(1), the court may "terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release" if the court "is satisfied that such action is warranted by the

[22] Section 3583(e)(2) requires that any extension of a term of supervised release be made "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation." Federal Rule of Criminal Procedure 32.1(b) does not require a violation of probation as a predicate to the modification (including extension) of probation, although Rule 32.1(a) does require a violation as a predicate to the revocation of probation. The district court's action to modify the conditions of supervised release is subject to review on appeal for abuse of discretion. See, *e.g.*, *United States* v. *Edgin*, 92 F.3d 1044, 1047 (10th Cir. 1996), cert. denied, 519 U.S. 1069 (1997); *United States* v. *Schechter*, 13 F.3d 1117, 1118-1119 (7th Cir. 1994).

conduct of the person released and the interest of justice." 18 U.S.C. 3583(e)(1) (1988 & Supp. IV 1992).

Section 3583(e) thus gives the court broad and flexible authority to monitor the offender's progress on supervised release and to adjust the conditions of the release as appropriate in light of the offender's situation. It is fully consistent with the tenor of those provisions to conclude that, when an offender has shown his unwillingness to comply with the conditions of supervised release, he may be required to start the term over again under Section 3583(e)(3) and to serve a part of that term in prison and the rest outside prison under continued supervision. But it would be inconsistent with the statutory theme of continued supervision to construe Section 3583(e)(3) to require that the person be discharged without supervision after serving time in prison, when that person has demonstrated by his violation that he is most in need of continued supervision in order to achieve successful return to productive society.

Under petitioner's (and the Sixth Circuit's) contrary construction of Section 3583(e)(3), if an offender on supervised release violated his conditions, and the district court concluded that both a limited period of reincarceration and intensification of the degree of supervision of the offender were necessary to promote his reintegration into society, the district court would nonetheless be precluded from achieving both of those objectives. The court would have to choose between the two. That construction leads to the peculiar result of requiring the district court to choose between exercising the greater power of ordering reincarceration or the lesser power of intensifying the conditions of supervised release, even for the same period of time, while denying the court the authority to combine those two powers. Thus, in the case of a Class A felony offender who was originally sentenced to five years' supervised release and who violated the conditions of supervised release, the district court could

require that offender to serve the remainder of the five-year term in jail, *or* it could substantially increase the offender's reporting requirements and limit his movements for the remainder of those five years, but it could not do both: it could not, for example, order the defendant to serve half of the remainder of the five-year term in jail and serve the second half outside prison, but subject to close supervision by a probation officer. There is no evident reason why Congress would have wanted to deny the district courts that option.

Petitioner's construction leads to particularly anomalous results in those cases where the defendant was initially sentenced to a term of supervised release that was less than the statutory maximum. Assume, for example, that an offender was a Class B felon and was therefore subject to a statutory maximum term of supervised release of five years. See 18 U.S.C. 3583(b). Assume further that the district court, when initially sentencing that defendant, concluded that three years of supervised release would be sufficient for his reintegration into society. If the offender violated his supervised release, but if that violation was not extremely serious, the district court might conclude that a limited period of reincarceration was necessary but that the offender needed further supervision after the period of reincarceration for his reintegration to be successful, and that he should be required to serve the two additional years of supervised release to which the district court could have initially sentenced him. In petitioner's view and that of the Sixth Circuit, the district court would not have the power to impose such an order. The district court would be required to choose between extending the term of supervised release to five years and foregoing reimprisonment, and ordering

reimprisonment and abandoning the policy of supervised release altogether.[23]

The construction of Section 3583(e)(3) we have advanced grants the district court the full flexibility contemplated by Congress for the court to adjust supervised release to assure the person's successful reentry into the community. If it appears that the person has successfully reintegrated into the community and does not need further supervision, the court may terminate the term of supervised release anytime after one year and discharge the person. 18 U.S.C. 3583(e)(1). If a modification during the term of supervised release is appropriate to assure the person's successful reentry into the community, a change can be made to the conditions of supervised release or its duration (within the statutory limit) as an exercise of the court's sound discretion. 18 U.S.C. 3583(e)(2). When a person has shown maladjustment by his inability or unwillingness to comply with the previous conditions of release, the court has the additional option of revoking the term, and requiring the offender to serve a short period of reimprisonment, followed by a new opportunity for the offender to achieve successful reintegration into the community through a renewed period of supervised release outside prison.

[23] A possible example of such a case is *United States* v. *Cooper*, 962 F.2d 339 (4th Cir. 1992). In that case, the defendant, who was convicted of a relatively minor narcotics offense under 21 U.S.C. 841(a)(1), involving less than one ounce of cocaine, was initially sentenced to five months of incarceration, to be followed by five years' supervised release, including drug treatment. (Because the conviction involved a narcotics offense, the maximum periods of supervised release in Section 3583(b) did not apply. See p. 3 n.2, *supra*.) When on supervised release he violated one of the conditions by seeing his girlfriend, who was a convicted felon. The district court revoked his supervised release and sentenced him to two months of intermittent confinement in a jail facility, to be followed by four and one half years of further supervised release. The court of appeals concluded that the renewed term of supervised release was not authorized by Section 3583(e)(3), because the district court had revoked the initial term of supervised release. 962 F.2d at 341-342. A district court operating under such a regime—forced to choose between ordering the defendant to serve additional time in prison but forfeiting the possibility of continued supervised release thereafter, and keeping the defendant on supervised release but foregoing the use of a short period of reimprisonment—might well order the defendant to serve a relatively lengthy period in prison since a short period in prison, without continued supervised release thereafter, might be insufficient to satisfy the purposes of supervised release in such a situation.

In accordance with our construction of Section 3583(e)(3), the district court had authority before Section 3583(h) was enacted to revoke petitioner's three-year term of supervised release and to require that he start over, serving up to the first 24 months in prison and the remaining 12 months on continued supervised release outside prison. Section 3583(h) did not give the district court any greater authority. Indeed, Section 3583(h) cabined the district court's authority in one respect; it provided that renewed obligation to serve supervised release outside prison may not be imposed unless the district court orders the offender to serve less than the maximum term of reimprisonment authorized by prison. See 18 U.S.C. 3583(h); *United States* v. *Davis*, 187 F.3d 528 (6th Cir. 1999) (remanding for district court to impose less than two-year maximum to be followed by continued supervised release).[24]

[24] Applying the terms of Section 3583(e)(3), a district court would have authority based on continued violations of the conditions of supervised release to revoke a person's supervised release a second time, or any number of subsequent times, and require him to start over each time, limited only by the abuse of discretion standard. That approach is consistent with the purpose of supervised release to ensure the person's successful integration into the community. Since on each occasion of revocation the offender must lose credit for time previously served on postrelease supervision, see 18 U.S.C. 3583(e)(3), the revocation process necessarily contemplates the possibility that a defendant will end up serving more time on supervised release than the maximum statutory term of supervised release that might originally have been imposed for his underlying offense.

c. *Background of supervised release*

Our construction also finds support in the practice of probation, parole, and special parole predating the introduction of supervised release into the federal system. See *O'Neil*, 11 F.3d at 298-300. A similar question arose under the old probation statute, which empowered the court to "revoke the probation * * * and * * * impose any sentence which might originally have been imposed." 18 U.S.C. 3653 (1982). The majority of courts concluded that a new term of probation was a "sentence" that might be imposed after the court's revocation of the initial term of probation. See *O'Neil*, 11 F.3d at 298-299 (collecting cases).

As to parole, "[t]here was never any question that nondetentive monitoring could follow a prison sentence imposed in consequence of the revocation of a term of parole or special parole." *O'Neil*, 11 F.3d at 299; see also *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 824 (D.C. Cir. 1995) (noting "the established pre-Guidelines sentencing principle that parole is available unless expressly precluded") (internal quotation marks omitted); 28 C.F.R. 2.52 App. (Parole Commission Policy Statement, referring to "an adequate period of renewed supervision following release from reimprisonment"). Congress, moreover, was aware of

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That does not mean, however, that an offender faces the prospect of endless returns to prison should he violate the conditions of his supervised release each time he is placed on supervised release. In our view, the maximum terms of reimprisonment authorized by Section 3583(e)(3) apply to the totality of the offender's history on supervised release after conviction for a particular offense, and not to each occasion on which he is placed on supervised release based on that conviction (including each time his supervised release might be revoked). Thus, an offender like petitioner who was convicted of a Class D felony faces only a maximum of two years' reimprisonment for all of his possible violations of supervised release based on that particular offense. At some point the district court's authority over an offender comes to an end. Cf. *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 823 (D.C. Cir. 1995) (reaching similar conclusion about old special parole statute, 21 U.S.C. 841(c) (1982)).

this practice, for the legislative history to the Sentencing Reform Act specifically noted that under pre-Guidelines law, "if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, *subject to periodic consideration for re-release* as required for any prisoner who is eligible for parole." *O'Neil*, 11 F.3d at 299 (quoting S. Rep. No. 225, *supra*, at 123) (emphasis added in *O'Neil* opinion). Congress therefore understood that the concept of "revoking" nondetentive monitoring like parole was fully consistent with the possibility that the offender would again be eligible for and subject to such monitoring even if the offender was also required to return to prison.

The practice under special parole, which before enactment of the Sentencing Reform Act was a part of the sentence required for certain narcotics offenses under Title 21, further supports our construction. Special parole is similar to supervised release in that it is a part of the criminal sentence required to be served after the defendant's completion of his prison term (or any other form of nondetentive supervision, such as probation), rather than in lieu of the prison term. See 28 C.F.R. 2.57(a). Under the old special parole statute, which was worded similarly to Section 3583(e)(3), when an offender's special parole term was revoked, his original term of imprisonment was increased by the period of the special parole term (without credit for the time spent on special parole outside prison), and "[a] person whose special parole term has been revoked [might] be required to serve all of part of the remainder of the new term of imprisonment." 21 U.S.C. 841(c) (1982). But although the special parole statute did not expressly provide for the reimposition of special parole after revocation of the initial term of special parole and reimprisonment, the Parole Commission required such reparole: "Should a parolee violate conditions of release

during the Special Parole Term he will be subject to revocation on the Special Parole Term * * * and subject to reparole or mandatory release under the Special Parole Term." 28 C.F.R. 2.57(c).[25] Moreover, like an offender whose supervised release is revoked and who loses credit for time spent outside prison, "a special parole term violator whose parole is revoked shall receive no credit for time spent on parole pursuant to 21 U.S.C. 841(c)." 28 C.F.R. 2.57(c).

Although the Sentencing Reform Act undoubtedly broke new ground in sentencing practices, including the introduction of supervised release, Congress did not completely discard past practice under probation, parole, and special parole (especially the last, of which supervised release was an

[25] A conflict in the circuits has recently developed as to whether the Parole Commission, upon revoking an offender's special parole, may lawfully impose another special parole term after a period of reincarceration. Compare *Billis* v. *United States*, 83 F.3d 209, 211 (8th Cir.) (Parole Commission does have such authority), cert. denied, 519 U.S. 900 (1996), and *United States Parole Comm'n* v. *Williams*, 54 F.3d at 823-824 (same), with *United States* v. *Robinson*, 106 F.3d 610, 611-613 (4th Cir. 1997) (Parole Commission does not have such authority; relying on court's earlier decision holding that court revoking supervised release could not impose new term of supervised release under Section 3583(e)(3)), *Artuso* v. *Hall*, 74 F.3d 68, 71-72 (5th Cir. 1996) (same), *Robles* v. *United States*, 146 F.3d 1098 (9th Cir. 1998) (Parole Commission may not impose second term of special parole; when it releases offender from reincarceration, it releases him on regular parole), *Fowler* v. *United States Parole Comm'n*, 94 F.3d 835, 840-841 (3d Cir. 1996) (same), and *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 264-265 (7th Cir. 1996) (same). None of those cases had been decided, however, when Congress enacted the supervised release provisions in the Sentencing Reform Act of 1984. At that time, the Parole Commission's thereto unchallenged regulations clearly stated, as they do now, that an offender whose special parole term is revoked and who is ordered to serve a period of reimprisonment may also be ordered to serve a new term of special parole. See 28 C.F.R. 2.57(c) (1984). That was the legal background against which Congress enacted Section 3583(e)(3). Cf. *Brown* v. *GSA*, 425 U.S. 820, 828 (1976) (relevant inquiry for congressional intent is what Congress's understanding of the law was at the time of legislative enactment, not whether that understanding is eventually proven correct).

expansion). That past practice made abundantly clear that an offender whose nondetentive supervision was revoked could be required to serve another such period of supervision after serving a period of reincarceration. Neither the text nor the legislative history of the Sentencing Reform Act gives any indication that Congress intended to depart from that settled practice. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Tome* v. *United States*, 513 U.S. 150, 163 (1995). That showing has not been made here.

B. If The Court Concludes That Section 3583(e)(3) Did Not Authorize A Renewed Term Of Supervised Release, Then The Entire Sanction Imposed On Petitioner For Violating Supervised Release Should Be Vacated And The Case Remanded For Further Proceedings

If the Court were to reject our submission that, at the time of petitioner's offense, Section 3583(e)(3) authorized the district court to order petitioner to serve a renewed term of supervised release after revoking his supervised release, the question would then arise whether the application of Section 3583(h) in this case violates the Ex Post Facto Clause because it "disadvantage[d] the offender affected by it by * * * increasing the punishment for the crime." *Lynce*, 519 U.S. at 441 (citation omitted). On the assumption that our construction of Section 3583(e)(3) is wrong, we agree that the sanction imposed on petitioner for violation of his supervised release in this case must be vacated and the case remanded, because the district court relied on Section 3583(h) to impose a sanction on petitioner that is not within the standard of punishment to which he could have been exposed under prior law.

1. The Application Of A New Statute That Raises The Maximum Possible Penalty But Does Not Raise The Minimum Possible Penalty Or Narrow the District Court's Discretion To Impose That Minimum Penalty May Not Violate The Ex Post Facto Clause Where The Offender Is Sentenced Within The Range Authorized Under Prior Law

The framework for identifying whether petitioner was disadvantaged by application of Section 3583(h) must begin with a precise description of the range of options available to the sentencing judge under old law, as compared to the new. Petitioner was convicted of a Class D felony. Under petitioner's construction of prior law, the district court, upon revoking supervised release for a Class D felon, could order the offender to serve a term of reimprisonment of up to two years. 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). Under current law, the district court, upon revoking supervised release, may order a Class D felon to serve up to three years of a combination of imprisonment and supervised release, provided that the term of imprisonment is less than two years. See 18 U.S.C. 3583(a), (e)(3), and (h). Thus, the district court retains the authority to order petitioner to serve the minimum sanction available under prior law, namely one day of reimprisonment alone.[26] But under current law, it would also have been possible for the district court to order petitioner to serve two years less one day of imprisonment, followed by one year and one day of supervised release.

[26] The district court's authority under Section 3583(h) to order an offender to serve a renewed term of supervised release as well is discretionary. See 18 U.S.C. 3583(h) ("the court *may* include a requirement that the defendant be placed on a term of supervised release after imprisonment") (emphasis added). Section 3583(h) therefore did not raise the minimum sanction for violation of supervised release.

That penalty is greater than the maximum available under prior law, two years' imprisonment.[27]

If the sole issue is whether the standard of punishment increased, Section 3583(h) would be considered an ex post facto law in all applications to pre-enactment offenders. While language in this Court's decisions suggests such an analysis,[28] the Court's holdings do not squarely address the precise situation presented where a new law raises the maximum sanction authorized by prior law, but does not raise the minimum sanction or narrow the sentencing court's discretion to impose it, and a particular offender is sentenced

[27] As to some classes of offenders, however, Section 3583(h) is almost certainly no more onerous than prior law in all its applications. For example, under petitioner's construction of prior law, a Class A felony offender who violated his supervised release could be ordered to serve a maximum of five years in prison, but no time on renewed supervised release. See 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). Under current law, however, certain Class A felony offenders whose supervised release is revoked can be ordered to serve a combination of prison and supervised release, up to a total of five years. See 18 U.S.C. 3583(b) (five years' maximum supervised release for Class A felons) and (h) (period of additional supervised release must be no more than the term of supervised release authorized for offense by statute, less any term of reimprisonment actually imposed); but cf. p. 3 n.2, *supra* (discussing life supervised release available for certain drug offenders). Section 3583(h) therefore did not increase the maximum permissible period of restraint to be imposed on those Class A felony offenders. Moreover, the actual conditions of the restraint are likely to be less onerous, because supervised release is a less intrusive restraint on an offender's liberty than incarceration. See *United States* v. *Brady*, 88 F.3d 225, 228-229 (3d Cir. 1996), cert. denied, 519 U.S. 1094 (1997). Nor would the mere potential for reimprisonment for a violation of supervised release make Section 3583(h) an ex post facto law as applied to such a case. See p. 44 n.34, *infra*.

[28] See *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937) ("the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed"); *Weaver*, 450 U.S. at 33 (ex post facto inquiry "looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual").

within the maximum sanction permitted under prior law.[29] None of this Court's ex post facto sentencing cases has involved that situation. See *Lynce*, *supra*; *Miller* v. *Florida*, 482 U.S. 423 (1987); *Weaver*, *supra*; *Lindsey* v. *Washington*, 301 U.S. 397 (1937).

In *Lindsey*, the Court concluded that the Ex Post Facto Clause precluded application of a new sentencing statute for grand larceny that fixed a mandatory 15-year prison sentence, with the possibility of parole during that term. At the time of the petitioner's offense, the applicable statute had imposed a maximum sentence of 15 years in prison, with a minimum term of six months, for the same offense. 301 U.S. at 398. The Court held that the new law could not be applied because it "ma[d]e mandatory what was before only the maximum sentence," 15 years in prison. *Id.* at 400. The Court rejected the argument that the petitioner suffered no disadvantage from the new law because he might have received a 15-year sentence under the old law; the new law was more onerous, the Court held, because it removed "the possibility of a sentence of less than fifteen years. * * * It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." *Id.* at 401-402.

In *Miller*, the Court invalidated, under the Ex Post Facto Clause, the application of a change in Florida's statutory

[29] Nor has the Court ever decided a case involving a new sentencing law that both lowers the minimum sentence and raises the maximum sentence from that under prior law—for example, where a statute authorizing a prison term of 5-10 years for an offense is replaced by one authorizing a prison term of 2-12 years. Cf. *Weaver*, 450 U.S. at 34 (considering, but rejecting, argument that the "net effect of all [new] provisions increased [rather than decreased] availability of gain-time deductions"); *Miller* v. *Florida*, 482 U.S. 423, 432 (1987) (noting that the State was not "able to identify any feature of the revised guidelines law that could be considered ameliorative").

sentencing guidelines that raised the presumptive sentence applicable to the petitioner. At the time of his offense, the petitioner's presumptive sentence was 3 1/2 to 4 1/2 years, but at the time of sentencing, the guidelines directed a presumptive sentence of 5 1/2 to 7 years, and the court actually imposed a sentence of seven years. See 482 U.S. at 424-425. There was a theoretical possibility that the petitioner might have received a seven-year sentence under the earlier law. But the Court observed that, to depart from the presumptive sentence under the guidelines, the sentencing judge was required to provide clear and convincing reasons in writing for the departure, on facts proved beyond a reasonable doubt, and the defendant would have had the right to appeal. See *id.* at 432-433. Because the petitioner had enjoyed none of those rights, the Court concluded that he "therefore was 'substantially disadvantaged' by the retrospective application of the revised guidelines to his crime." *Id.* at 433.

In *Weaver*, the State repealed a statute that had made available gain-time credits of five, ten, and fifteen days per month, depending on the length of the prisoner's incarceration, and replaced it with a new statute that made available credits of only three, six, and nine days per month respectively. See 450 U.S. at 26. The new statute was indisputably more onerous than prior law; as the Court explained, "[o]n its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in [the inmate's] position must spend in prison." *Id.* at 33. Similarly, in *Lynce*, the statute under review retroactively canceled prison-overcrowding early-release credits that had been available under the law at the time the offender (and any other inmate convicted of murder or attempted murder) committed his offense. See 519 U.S. at 436. Every offender who fell within the class covered by

the law lost the opportunity to accumulate good-time credits that had been available under prior law, and indeed many lost credits that had already been accumulated.

All of those cases involved a situation where the new law eliminated or significantly reduced the possibility, available under prior law, that the offender might have received a more lenient sentence than was actually imposed. None of those cases addressed the situation presented here, where the new law does not raise the minimum authorized sentence, or alter a judge's discretion to impose it, but does raise the maximum authorized sentence. In *Lindsey*, the Court did allude to that situation, stating that "[t]he Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer," and that "[i]t is for this reason that an increase in the possible penalty is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." 301 U.S. at 401 (citations and internal quotation marks omitted).[30] But

[30] *Lindsey* cited *State* v. *Callahan*, 109 La. 946 (1903), in which a new statute raised the maximum penalty but not the minimum penalty above that authorized under prior law. In *Callahan*, the defendant was convicted for selling liquor without a license. The old law, in effect at the time of the offense, established a penalty of a fine of $100-$500, and in default of payment the convicted defendant was to be imprisoned to not less than 30 days nor more than four months. The new law provided alternative penalties: under one alternative, the fine remained the same ($100-$500), but in default of payment, the defendant was to be imprisoned "for a term within the discretion of the court"; under the second alternative, the defendant was to "suffer fine and imprisonment as the court may deem proper." *Id.* at 947. The defendant in that case was ordered under the new law to pay a fine of $350, but was not ordered to serve any term of imprisonment. The State argued that the new law was not ex post facto because the penalty imposed on the defendant was within the limit of both the old and the new laws. The Louisiana Supreme Court disagreed, stating that, "[e]ven though a penalty is only possible, and not necessary, the law is ex post facto as to past offenses." *Id.* at 948.

Lindsey's observation as to increases in the maximum penalty was dictum, and it is not necessarily the case that application of a new law that elevates a statutory maximum term, but does not alter the minimum or restrict the sentencing court's discretion to impose it, imposes the sort of "detriment" that this Court has required to find an ex post facto violation.

The elevation of a minimum sentence is somewhat different from the elevation of the statutory maximum. In the former situation, all defendants are denied at least the possibility of being considered for a sentence below the minimum authorized under the new law.[31] The same is not inexorably true when the statutory maximum is raised. There may be circumstances in which the fact that the legislature has increased the maximum sentence authorized for an offense, by itself, should not render the new statute an ex post facto law in certain applications where the defendant was sentenced within the range authorized by prior law.

When a sentencing judge has all the sentencing options that were available under prior law, but has as well a higher statutory maximum, and the judge imposes a sentence within the prior maximum term, the defendant has not experienced a detriment from the new law in a direct sense, *i.e.*, the imposition of a more onerous sentence than was available under prior law. It is conceivable that the defendant might have experienced an indirect detriment, *i.e.*, the imposition

[31] If the court's sentencing options are restricted by binding sentencing guidelines, however, a defendant may not experience actual prejudice from application of such a law. For example, if Congress elevated the statutory minimum for an offense but the Sentencing Guidelines applicable to a particular defendant's crime were not changed, and the district court made clear on the record that the defendant would not receive a downward departure from the Guidelines range in any event, it is difficult to see how the defendant would be prejudiced based on deprivation of the entirely theoretical possibility that the district court might have departed downward and imposed a sentence authorized under old law but not new law.

of a greater sentence within the preexisting range because the judge was influenced by the higher maximum penalty. But legal boundaries on the judge's discretion or the sentencing record itself may make any such possibility remote or nonexistent. Assume, for example, that, between the time of a defendant's crime and his sentencing, Congress increased the penalty for the defendant's offense from 5-10 years to 5-12 years, but that the Sentencing Guidelines applicable to the defendant's individual circumstances were not changed before the defendant was sentenced, and that the district court made clear that no upward departure would be warranted on the facts of the case before it. If the defendant was sentenced below the statutory maximum authorized under prior law and within the Sentencing Guidelines range, it is not clear that the defendant should receive any relief. There would have been, at most, a theoretical possibility that, if the district court had found reason for an upward departure, then the sentence would have been above that authorized under prior law, and a speculative possibility that the district court might have sentenced him at the high end of the Guidelines range based on Congress's elevation of the maximum penalty. Those forms of harms from the change might be deemed so "speculative and attenuated," *California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 514 (1995), as to defeat any ex post facto claim or render it, at worst, harmless error. See Fed. R. Crim. P. 52(a); *Chapman* v. *California*, 386 U.S. 18 (1967).

2. The Actual Sanction Imposed On Petitioner Following Revocation Of His Supervised Release Cannot Confidently Be Said To Be Less Onerous Than That Available Under Prior Law

This case, however, does not present an occasion for the Court to consider the possibility that the mere increase in a statutory maximum sentence does not violate the Ex Post Facto Clause as applied to a defendant sentenced within the

range authorized under prior law. If our construction of Section 3583(e)(3) is rejected, it is not sufficiently clear that the sanction that the district court imposed on petitioner for violating his supervised release could be said to be within the range of sanctions available under prior law.

There are at least two ways of considering whether Section 3583(h) was applied to petitioner's detriment, compared to prior law. The first is to look at petitioner's expectations at the time he committed his offense. At that time, it is undisputed that the law authorized the court to require petitioner to serve as much as three years' supervised release, followed by two years' reimprisonment if his supervised release were revoked at the end of that period. Petitioner might not have violated the conditions of his supervised release until the end of his term, and even if his violation occurred earlier, his supervised release might not have been revoked until the end of his term.[32] Under either circumstance, petitioner could have been required to serve the maximum possible periods of restraint on his liberty, both in the form of supervised release and reimprisonment, that were authorized by statute.

The *actual* periods of supervised release and reimprisonment that petitioner was required to serve in this case are

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[32] Petitioner had no statutory or constitutional expectation that his supervised release would be revoked immediately after his violation or at any time before the expiration of his three-year term of supervised release. See *Moody* v. *Daggett*, 429 U.S. 78, 87-89 (1976) (no constitutional right to parole-revocation hearing immediately upon issuance of the violation warrant, even when warrant had been outstanding for more than ten years; right to hearing accrues only when violator is taken into custody on the violation warrant). Indeed, under settled law, supervised release may be revoked and the offender returned to prison after the term of supervised release has expired, provided that the revocation warrant was filed during the period of supervised release. *United States* v. *Morales*, 45 F.3d 693, 700-701 (2d Cir. 1995); *United States* v. *Barton*, 26 F.3d 490, 492 (4th Cir. 1994); *United States* v. *Neville*, 985 F.2d 992, 995 (9th Cir.), cert. denied, 508 U.S. 943 (1993).

significantly less than those authorized by statute under prior law. After his initial release from prison, petitioner spent about seven months on supervised release before he committed his violations. Then (putting aside the time petitioner spent in state prison), after his supervised release was revoked, petitioner actually spent about 14 months in prison,[33] and was also required to serve 12 months' further supervised release. Thus, after his release from his initial term of imprisonment, petitioner has been required to serve a total of about 14 months in prison and about 19 months on supervised release. Each of those periods is less than the maximum he unquestionably might have been ordered to serve under prior law–24 months in prison and 36 months on supervised release.

Nevertheless, we do not believe it can be said with confidence that the measure of punishment in Section 3583(h) did not cause petitioner actual disadvantage. If old law had been applied, the judge very likely would not have deferred revocation of petitioner's supervised release to the end of its term, and then imposed the maximum period of reimprisonment. And under the old law, all of petitioner's potential supervised release would be served before his reimprisonment; under the new law, petitioner served supervised release both before and after reimprisonment. Even setting aside the potential for reimprisonment on the renewed period of supervised release,[34] the sequence of serving

[33] When his supervised release was revoked, petitioner was ordered to serve 18 months of reimprisonment, but he was released early. See p. 13, *supra*.

[34] If the offender were to violate the conditions of his renewed term of supervised release, then current law would authorize the district court to revoke his supervised release again and order him to serve an additional term in prison, provided that the total amount of reimprisonment imposed on the offender for violating his supervised release both times was no more than two years. The possibility that an offender's supervised release might be revoked a second time and that the offender might be sent back to prison again, however, must be considered entirely speculative before such a second revocation occurs. At the time that an offender is placed on supervised release, there is no reason to believe that he will violate the conditions of his supervised release; nor is there reason to believe that, even if such a violation occurs, the district court will necessarily revoke his supervised release and order him to serve a term of reimprisonment rather than act under Section 3583(e)(2) to intensify the conditions of his supervised release. See *United States* v. *Withers*, 128 F.3d 1167, 1170-1172 (7th Cir. 1997), cert. denied, 119 S. Ct. 79 (1998). The Court has made clear that the Ex Post Facto Clause is not violated by "the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." *California Dep't of Corrections* v. *Morales*, 514 U.S. at 514. Should a defendant violate his supervised release a second time, the district court can consider at that time whether the Ex Post Facto Clause would prevent it from imposing additional prison time on the offender.

supervised release, then prison time, then additional supervised release may be viewed as a more onerous feature of petitioner's actual sanction under new law compared to his exposure under old law.

Alternatively, the degree of the sanction imposed on petitioner may be viewed from the vantage point of petitioner's legal exposure at the time his supervised release was revoked. At that time, under petitioner's understanding of prior law, the maximum exposure petitioner had was 24 months' reimprisonment, after which he would have been released without restraint. In fact, the total restraint on petitioner's liberty imposed by the district court upon revoking his supervised release was 30 months, consisting of 18 months' reimprisonment to be followed by 12 months' supervised release. To be sure, petitioner might be said to have received a *benefit* from application of Section 3583(h) to his case, because if the district court had lacked the authority to impose a renewed term of supervised release, it might well have ordered petitioner to serve the maximum term of reimprisonment available under prior law, 24 months, rather than the 18 months' reimprisonment that it actually imposed on petitioner. Despite that point, however, it cannot be said that the 30-month sanction imposed on petitioner was within

the range of sanctions available under petitioner's version of prior law.

3. If Application Of Section 3583(h) To Petitioner Violated The Ex Post Facto Clause, The Proper Remedy Is A Remand For The District Court To Apply Former Section 3583(e) To Petitioner

If Section 3583(h) cannot be applied in this case because of ex post facto concerns, then the case should be remanded to the district court. "The usual remedy for an ex post facto violation in sentencing is a remand for resentencing under the law in place at the time the defendant committed his crime." *United States* v. *Lominac*, 144 F.3d 308, 316 (4th Cir. 1998); see *Weaver*, 450 U.S. at 36 n.22. In this case, the district court should consider application of that law in the first instance, in light of petitioner's particular circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2000

APPENDIX A

The *pre-amendment* version of 18 U.S.C. 3583 was as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not possess illegal controlled substances. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release,

pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony; or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs,

to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Possession of controlled substances.—If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

APPENDIX B

The *post-amendment* version of 18 U.S.C. 3583 is as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release,

shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to

confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States,

and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds

by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised

release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.